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No. 87-1378 (2)

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

WILLIAM EVANS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE PRECLUDE PROSECUTION FOLLOWING A DISMISSAL BASED ON THE TRIAL COURT'S ERRONEOUS CONCLUSION THAT THE STATE'S INABILITY TO ALLEGE THE SPECIFIC DATE OF THE OFFENSE DENIED THE DEFENDANT HIS RIGHT TO NOTICE AND TO PRESENT AN ALIBI?

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONNECTICUT GENERAL STATUTES

Sec. 53-21. Injury or risk of injury to, or impairing morals of, children. Any person who willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both.

Sec. 53a-49. Criminal Attempt: Sufficiency of conduct; renunciation as defense. (a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1)

Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or ommission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) unless it is strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering

the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(c) When the actor's conduct would

otherwise constitute an attempt under subsection (a), it shall be a defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Sec. 53a-70. Sexual assault in the first degree: Class B felony: One year not suspendable. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person.

(b) Sexual assault in the first

degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court.

Sec. 53a-71. Sexual assault in the second degree: Class C felony: Nine months not suspendable. (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under fifteen years of age, or (2) mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual intercourse, or (3) physically helpless, or (4) less than eighteen years old and the actor is such person's guardian or otherwise responsible for the welfare, or (5) in custody of law or detained in a hospital or other institution and the actor has

supervisory or disciplinary authority over such other person.

(b) Sexual assault in the second degree is a class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court.

Sec. 53a-95. Unlawful restraint in the first degree: Class D felony. (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury.

(b) Unlawful restraint in the first degree is a class D felony.

Sec. 54-96. Appeals by the state from superior court in criminal cases. Appeals from the rulings and decisions of the superior court, upon all ques-

tions of law arising on the trial of crimnal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court or to the appellate court, in the same manner and to the same effect as if made by the accused.

§ 831 Bill of Particulars--Time for Filing

Pursuant to Sec. 811, the defendant may make a motion, or the judicial authority may order at any time, that the prosecuting authority file a bill of particulars.

§ 4023. Transfer of Cases by Supreme Court-In General

The supreme court may transfer to itself a cause in the appellate court. Except for any matter brought pursuant to its original jurisdiction under the

constitution, the supreme court may transfer a cause or class of causes from itself, including any cause or class of causes pending on July 1, 1983, to the appellate court. The court to which a cause is transferred has jurisdiction.

There shall be no fee on such transfer, but an appellant other than the state or a party for whom fees, costs and security have been waived pursuant to Sec. 4016 shall within 20 days file in the trial court a substituted recognizance in the amount of $500.00. The chief clerk of the supreme court shall notify all parties and the clerk of the trial court that the appeal has been transferred. A case so transferred shall be entered upon the docket of the court to which it has been transferred and the chief clerk shall

require the parties to take such steps as may be necessary to make the appeal conform to the rules of the court to which it has been transferred.

Upon the transfer of an appeal, the time within which the briefs or other documents must be filed shall be governed by the rules of the court to which the case has been transferred, except that such time limit for the document next to be filed shall not be less than thirty days from issuance of the notice of transfer.

STATEMENT OF THE CASE

The state charged the defendant in an undated six count information with two counts of sexual assault in the first degree, Connecticut General Statutes § 53a-70(a)[1]; two counts of sexual assault in the second degree, Connecticut General Statutes § 53a-71(a); one count of unlawful restraint in the first degree, Connecticut General Statutes § 53a-95(a); and one count of risk of injury to a minor, Connecticut General Statutes § 53-21. R. at 1.[2] In its arrest warrant affidavit and pleadings, the state alleged that during July 1984 the defendant sexually assaulted a

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[1] The text of all Constitutional, statutory, and Connecticut Practice Book provisions appears supra, pages iii-xii.

[2] Citations are to the printed Record in the Connecticut Supreme Court.

fourteen year old boy enrolled in an alcohol counseling program run by the defendant.

On April 24, 1985, the defendant filed a motion for a Bill of Particulars requesting, inter alia, that the state specify the date and time of the offenses charged. See Practice Book § 831. R. at 2. On February 4, 1986, the state filed a substitute information deleting one count of sexual assault in the first degree and one count of sexual assault in the second degree and adding a count each of attempted sexual assault in the first degree and attempted sexual assault in the second degree, Connecticut General Statutes §§ 53a-49(a)(2), 53a-70(a), 53a-71(a)(1). R. at 2-3.

In response to the defendant's motion, the state filed a Bill of

Particulars dated February 10, 1986, alleging that the offenses took place during the late afternoon, early evening hours, on one of the last two weekends in July 1984. R. at 3-6. The date of the assault was thus restricted to one of four possible dates: July 21, 22, 28, or 29, 1984.

Despite the fact that the state's allegations had narrowed the occurrence to a period of several hours on one of four days in July, the defendant filed a motion to dismiss the information, alleging that "the amended information as to date and time is not specific enough for him to assert an alibi defense, to confront his accuser, and in general to adequately present a defense." The trial court denied the motion on February 10, 1986, the same

date that it was filed. R. at 7.

On February 13, 1986, after the jury had been sworn,[3] the defendant filed a motion requesting receipt of further particulars or, alternatively, dismissal of the charges. R. at 7-10. At the hearing on the defendant's motion, counsel for the defendant claimed to have alibi witnesses for three of the four days alleged by the state. T. at 8. The court again denied the defendant's motion. R. at 10.

On the following day, counsel for the defendant provided the court with affidavits of his claimed alibi witnesses. R. at 14. After receiving the affidavits, the trial court reconsidered the defendant's motion sua sponte and

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[3] The jury was sworn on February 10, 1984.

dismissed the information. R. at 11; see Petitioner's Appendix at 16A-42A (Trial Court's Oral Memorandum of Decision). The state immediately excepted to the trial court's ruling and requested permission to appeal pursuant to Connecticut General Statutes § 54-96. The defendant objected to the state's request claiming that such an appeal would violate double jeopardy. The trial court overruled the defendant's objection and gave the state permission to appeal. T. at 31-32.

The state's appeal was originally filed in the Connecticut Appellate Court. On March 7, 1986, the defendant moved to dismiss the state's appeal on the ground that it was barred by the Double Jeopardy Clause of the United State's Constitution. The state opposed

the defendant's motion; both sides filed memoranda of law setting forth their positions. After hearing argument, the Appellate Court denied the motion to dismiss. Thereafter, the Connecticut Supreme Court transferred the appeal to itself, pursuant to Practice Book § 4023.

In his brief on appeal, the defendant claimed that the trial court's dismissal was the functional equivalent of an acquittal and that a remand for trial would violate the double jeopardy clause of the Fifth Amendment to the United State's Constitution and the due process clause of the Connecticut Constitution. On December 15, 1987, the Connecticut Supreme Court found that the trial court erred in granting the defendant's motion to dismiss and that double

jeopardy did not bar a remand for trial. The court therefore remanded with direction to deny the motion to dismiss and for further proceedings according to law. State v. Evans, 205 Conn. 528, 534 A.2d 1159 (1988).

The defendant petitions for a writ of certiorari to review the Connecticut Supreme Court's resolution of his double jeopardy claim.

SUMMARY OF THE ARGUMENT

The defendant contends that the trial court's order dismissing the information after jeopardy had attached was a dismissal "on the merits" and, as such, operated as an acquittal. Petition at 17-18. He bases this contention on two premises: first, that the trial court ruled, albeit erroneously, that time was an element of each offense

alleged by the state; and second, that the state conceded it could not prove the precise date on which the assaults occurred. Petition at 15-16. Thus he contends that the trial court dismissed the charges because it considered the state's evidence legally insufficient.

The defendant's petition does not warrant this court's consideration. The opinion below neither disregards precent nor poses an issue on which various jurisdictions are split.

Moreover, the record reveals that the trial court based its dismissal on considerations of notice and prejudice to the defendant's anticipated defense, not on the sufficiency of the evidence. On this basis, the Connecticut Supreme Court correctly held that the trial court's dismissal was not a determina-

tion of any of the factual elements of the offense charged. State v. Evans, 205 Conn. at 538.

Nevertheless, even if the defendant's premises are accepted as true, the Connecticut court's resolution is sound. A trial court's erroneous assumption that time is an element of an offense cannot change the composition of a statutorily-defined crime. Therefore, because the dismissal was entered at the defendant's request and on basis unrelated to guilt or innocence, a subsequent trial does not violate double jeopardy.

REASONS FOR DENIAL OF THE WRIT

PETITIONER'S CLAIM IS CONTROLLED BY ESTABLISHED CASE LAW AND THUS DOES NOT WARRANT THIS COURT'S ATTENTION

The mere fact that the jury had been sworn, and thus jeopardy attached;

Serfass v. United States, 420 U.S. 377 (1975); prior to dismissal does not mean that further proceedings against the defendant are barred. The law is clear that, where "the defendant elect[s] to seek termination of the trial on grounds unrelated to guilt or innocence," a retrial does not offend double jeopardy. United States v. Scott, 437 U.S. 82, 96-97 (1978). The operative question is whether "`the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" Id., at 97 quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

A review of the proceedings reveals that the trial court never weighed the

evidence in this case. Indeed, at the time of its ruling no evidence had yet been presented.[4] Rather, the court simply concluded, as a matter of law, that the state's inability to allege the precise date of the offense prejudiced the defendant in the preparation of his case and the presentation of his alibi. The court's ruling was thus based on the defendant's rights to notice of the charges against him and to present a defense, not on a finding of insufficiency.

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[4] The Connecticut Supreme Court found that "prior to the dismissal of the substitute information, the trial judge had before him for consideration only the record pleadings (the substitute information and the motions) and the three affidavits submitted by the defendant for consideration in support of his motion to dismiss." State v. Evans, 205 Conn. at 528, 536, 534 A.2d 1159 (1988). None of these documents constitute evidence. Id.

Although the trial court's characterization of the nature of its action is not determinative; United States v. Sisson, 399 U.S. 267, 270 (1970); review of the basis of the defendant's trial motions and the scope of the court's ruling is illuminating. The defendant's original motion to dismiss asserted that the "amended information as to date and time is not specific enough for him to assert an alibi defense, to confront his accuser, and in general to adequately present a defense." R. at 7. His subsequent motion, in which he requested further specification in the pleadings or a dismissal, again asserted that "[w]ithout the specific date of the alleged offenses the Defendant will be seriously prejudiced and his constitutional rights to due process, equal

protection, confrontation, and effective assistance of counsel under the State and Federal Constitutions violated." R. at 9. Further, when granting the defendant's motion, the trial court "specifically disclaimed making a factual determination of whether the defendant is guilty or innocent of the charges." State v. Evans, 205 Conn. at 538.[5] Instead, the court made clear

[5] The Connecticut Supreme Court quoted from the trial court's oral memorandum of decision as follows:

> In rendering its decision the trial court stated: `I want it completely understood that [this decision] is in no way related to my opinion as to whether or not the defendant is guilty or not guilty of these charges. That is not my function . . .[this decision] is not to be considered by anyone [as] an opinion by me that I think that the defendant is innocent of these charges. My decision is not to be given any weight with regards to innnocence or guilt.

that its ruling was based on a supposition prejudice to the defendant's alibi defense. See R. at 17; Petitioner's Appendix at 34A (oral memorandum) ("Without knowing the specific dates that this event is alleged to have occurred, it's impossible for the jury to be able to weigh an alibi defense against the testimony of the victim because there is no way that the jury will be able to say, well, this event occured (sic) on July 1st, hypothetically, and the defendant has an alibi for July 1st.")

Thus, neither the court nor the defendant himself characterized the issue at trial as one of guilt or innocence. Rather, it is clear that the defendant was asserting his right to

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State v. Evans, 205 Conn. at 533.

sufficient specificity in the charges to allow him to prepare his defense. Further, once the date of the offenses was narrowed down to four days in July 1984, the defendant contended that the state's inability to pinpoint the precise day denied him the effectiveness of his proposed alibi defense.

The defendant's assertion that the court dismissed on the mistaken belief that the date of an offense is an essential element is not supported by the record. In its oral ruling, the court noted that " . . . [Connecticut] law is pretty well established that unless the date is an element of the--material element of the crime, the specific date and time of the event is not essential." R. at 15; Petitioner's Appendix at 31A. The court went on to

note that some authority indicates that the date "may be material where not providing the date may prejudice the rights of the defendant to assert defenses." Id. When the court's remarks are viewed in context, it is clear that the court did not find that an alibi transforms the date of an offense into an element of the crime, but only that the date may become "material" to the defendant if he asserts an alibi defense.

Nevertheless, if the court's remarks are interpreted to signify that it believed the date of the offense is, under some circumstances, an element of the crime, the defendant is still not entitled to the double jeopardy protection he claims. A trial court's erroneous assumption that something is an

element of the crime does not make it so. United States v. Maker, 751 F.2d 614, 624 (3rd Cir. 1984) cert. denied, 472 U.S. 1017 (1985) (holding that district court's dismissal because the state could not prove what it erroneously assumed to be an element of the offense did not operate as an acquittal.) Therefore, because the court did not determine any of the actual elements of the offense in the defendant's favor, double jeopardy presents no barrier to prosecution. The public should not be deprived of "its valued right to 'one complete opportunity to convict those who have violated its laws.' Arizona v. Washington, [434 U.S. 497, 509 (1978)]." United States v. Scott, 437 U.S. at 100.

CONCLUSION

Because the issue advanced by petitioner is not one on which various courts have split and may be comfortably decided on the basis of existing case-law, it does not warrant this Court's attention. The State of Connecticut respectfully urges this Court to deny the defendant's petition for certiorari.

Respectfully submitted,
THE STATE OF CONNECTICUT

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